No. 11864

United States Circuit Court of Appeals

For the Ninth Circuit

RECONSTRUCTION FINANCE CORPORATION, a corporation,

Appellant,

vs.

SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, a corporation,

Appellee.

Upon Appeal from the United States District Court
For the District of Oregon.

BRIEF OF APPELLEE

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CASES CITED

STATUTES AND TEXTBOOKS

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STATEMENT OF THE CASE

Appellant's statement of facts is substantially correct. The issue at the trial and the one to be determined on this appeal is which of two items of appellee's tariff is applicable. Item 1563 of the tariff,

which appellant contends was applicable, was specifically limited to alcohol in bond. If this item is not applicable to the alcohol involved, it automatically becomes subject to Item 1497 of the tariff, which applies generally to all alcohol not otherwise specified. The ultimate issue, therefore, is whether the alcohol involved in the particular shipments was alcohol in bond within the meaning of Item 1563 of the tariff.

SUMMARY OF ARGUMENT

1. The words of a tariff are to be given their common meaning and neither carrier nor shipper can be permitted to urge a strained and unnatural construction.

American Ry. Express Co., Inc. v. Price Bros., Inc. (5 C. C. A.), 54 F. (2d) 67.

Armstrong Mfg. Co. v. Aberdeen & Rockfish R. R. Co., 96 I. C. C. 595.

2. The term "alcohol in bond" has a well-defined meaning in law which excludes tax-free alcohol.

26 U. S. C. A. 2800, et seq.

3. Only the Interstate Commerce Commission has the authority to determine whether rates fixed by a tariff are reasonable.

Great Northern R. R. Co., et al., v. Merchants Elevator Co. (1922), 259 U. S. 285, 42 S. Ct. 477.

4. Where the words of a tariff are used in a peculiar sense and there is a dispute as to the meaning, the preliminary determination of such dispute must be made by the Interstate Commerce Commission.

Great Northern R. R. Co., et al., v. Merchants Elevator Co., supra.

Texas & Pacific R. R. Co. v. American Tie & Tbr. Co., 234 U. S. 138, 34 S. Ct. 885.

Macon D. & S. Ry. Co. v. General Reduction Co. (C. C. A. 1930), 44 F. (2d) 499, 283 U. S. 821, 51 S. Ct. 345.

5. The rule of res inter alias acta precludes the admission in evidence of transactions between either strangers to the action, or one party to the action and a stranger.

20 Am. Jur. 280.
Boord v. Kaylor, 100 Ore. 366, 197 Pac. 296.
State v. German, 162 Ore. 166, 184, 90 P. (2d) 185.

Chapman v. Metropolitan Life Ins. Co. (S. C.), 173 S. E. 801.

Chicago and E. I. R. Co. v. Schultz (Ill.), 71 N. E. 1050.

ARGUMENT

In determining the proper application of the tariff, the words used therein are to be given their common meaning. *American Ry. Express Co., Inc. v. Price Bros., Inc.* (5 C. C. A.), 54 F. (2d) 67. In *Armstrong Mfg. Co. v. Aberdeen & Rockfish R. R. Co.*, 96 I. C. C. 595, it is said:

> "While doubts as to the meaning of a tariff must be resolved in favor of the shipper and against the carrier which compiled it, the doubt must be a reasonable one. In interpreting a tariff the terms used must be taken in the sense in which they are generally understood and accepted commercially and neither carriers nor shippers can be permitted to urge for their own purposes a strained and unnatural construction."

The term "alcohol in bond" has a well-defined meaning in law which is derived from Chapter 26 of the Internal Revenue Code (26 U. S. C. A. 2800 et seq.). This code deals with taxes on distilled spirits and sets up a system of control to insure collection of the tax. Under the system, prior to payment of the tax, alcohol is held in bonded warehouses, the purpose of the bond being to insure that it will not be withdrawn without payment of the tax. The law provides that the tax will be paid when the alcohol is withdrawn from bond (26 U. S. C. A. 2800).

At the trial, Mr. Michelsen testified concerning the method of handling shipments of commodities in bond. In such instances the bill of lading identifies the shipment as "in bond" and the shipment is always consigned either to the Collector of Customs or the Collector of Internal Revenue. It is generally accompanied by manifest papers showing the shipment is made under a carrier's bond. In such cases the Collector of Customs or the Collector of Internal Revenue is immediately notified on arrival of the shipment. The carrier's bond referred to applies only to shipments moving to the Collector of Customs, and not to those moving to the Collector of Internal Revenue, in which cases no carrier's bond is in effect (Tr. 56, 57).

There is no contention here that the alcohol was subject to a bond as described in the Internal Revenue Code. As pointed out by the trial court, the alcohol was released from bond when it was shipped (Tr. 59); and as testified to by Mr. Michelsen, there was no carrier's bond covering the shipment (Tr. 57).

It is thus seen that the term "alcohol in bond" has a well-defined meaning in law. It is alcohol upon which a bond is maintained to insure the payment

of internal revenue tax. Necessarily, in such a case, the tax has not been paid. But it does not follow that all alcohol upon which no tax has been paid is alcohol in bond. The very term "in bond" implies that a tax will be paid when it is withdrawn from bond, and therefore that it cannot be tax free. The very term "tax free" means that no tax is payable and, therefore, that there is no bond to insure payment. In these circumstances we see no room for argument that because the alcohol was tax free it was therefore alcohol in bond.

Appellant argues that the "in bond" rate should apply to tax-free alcohol because the hazard to the carrier in case of loss or damage to the shipment is the same as in the case of alcohol in bond. This argument, however, goes to the question of whether the tariff rate is reasonable and is a question which lies exclusively within the jurisdiction of the Interstate Commerce Commission. *Great Northern Railway Company, et al., v. Merchants Elevator Company* (1922), 259 U. S. 285, 42 S. Ct. 477.

It is well settled that if the words in the tariff are used in their ordinary sense, the court has authority to determine the meaning of the words and apply that meaning to the undisputed facts. Likewise, if

the only question is one of fact concerning the identity of the commodity, the court has power to make the determination. But if a peculiar meaning is to be attached to the words used in a tariff and there is a dispute concerning such meaning, the inquiry is one of fact and of discretion in technical matters, and in such cases there must be a preliminary determination by the Interstate Commerce Commission before a court will take jurisdiction of the controversy. In *Great Northern Railway Company, et al., v. Merchants Elevator Company*, supra, the Court said:

> "But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained.For the effect to be given the tariff might depend, not upon construction of the language — a question of law — but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed."

As we have pointed out, if the term "alcohol in bond" is to be given its usual meaning as derived from the Internal Revenue Code, alcohol which has been withdrawn from bond, which is tax free, and upon which no bond is posted, is clearly not within the term "alcohol in bond." We believe that the term "alcohol in bond" is unambiguous and is of such well-defined and established meaning that the only course open to the District Court was to hold that the alcohol involved herein was not in bond. But if it is considered that the term "alcohol in bond" is ambiguous, or has been used in a sense other than that ordinarily understood, then, since there is a conflict of opinion whether the term applies to tax-free alcohol, there is an issue of fact as to what meaning was intended and, in the interest of uniformity, there must first be a determination by the Interstate Commerce Commission before the court will assume jurisdiction. *Great Northern Railway Company v. Merchants Elevator Company*, supra; *Texas and Pacific Railway Company v. American Tie and Timber Company*, 234 U. S. 138, 34 S. Ct. 885.

The case last cited involved a controversy whether oak railway crossties were included in the tariff rates for lumber. The testimony disclosed an irreconcilable

conflict concerning whether crossties were lumber. In these circumstances the court held that the question was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by statute. The court said that it could not, as an original question, exert authority over subjects which primarily come within the jurisdiction of the Commission.

In one of the cases cited by the appellant (*Macon D. & S. R. Company v. General Reduction Co.* (C. C. A. 1930), 44 F. (2d) 499, certiorari denied, 283 U. S. 821, 51 S. Ct. 345), the court commented upon the Texas and Pacific Railroad Company case, pointing out that there was no dispute as to the identity of the subject matter of the shipment, which was agreed to be crossties, but that the question was whether they ought to be hauled as lumber on the same rate as lumber, which really involved rate-making considerations peculiarly for the handling of the Commission.

In like manner, in the case at bar, there is no dispute as to the identity of the commodity involved. It is agreed that it was tax-free alcohol which had

been withdrawn from bond. The only question raised is whether, by use of the term "alcohol in bond," the carrier intended to include alcohol not in bond but as to which the hazard in case of loss was the same. This is a question of fact and of discretion in technical matters which may be considered only by the Interstate Commerce Commission.

None of the cases cited by appellant support its position. The case of *Macon D. & S. R. Company v. General Reduction Company*, supra, involved solely a factual question whether the commodity involved was clay or fuller's earth. The court was not required to extend the meaning of the words used in the tariff. The sole question was one of identity which the court had power to determine.

In the case of *Pennsylvania Railroad Company v. United States* (Court of Claims 1930), 42 F. (2d) 600, the particular question was whether crepe paper bandages could be considered as covered by the tariff classification of "surgical bandages," or whether it fell within the general classification of "paper, NOIBN." The court observed that if the commodity was devoid of features which entitled it to specific classification, then it would fall in the general classification. It was contended that the crepe paper band-

ages were not surgical bandages because they could not be applied directly to wounds. The court found, however, as a matter of fact, that the commodity was a surgical bandage as generally understood in the trade, even though it could not be applied directly to wounds. The ordinary meaning of surgical bandages did not require that they be suitable for direct application to wounds. Here again the question was solely a factual one of identity, which was within the power of the court to decide. No extraordinary meaning was attached to the words used in the tariff.

In *American Railway Express Company v. Price Bros. Inc.* (5 C. C. A. 1931), 54 F. (2d) 67, the sole question involved was whether small onions shipped for purposes of planting fell within the tariff classification "onions, green." There was no claim of ambiguity or that the words used in the tariff had a peculiar or unusual meaning. The only question was whether the commodity involved fell within the usual meaning of such words.

In the case at bar, unlike the cases cited by the appellant, if the ordinary and usual meaning is attributed to the use of the words "alcohol in bond," it is clear that this item of the tariff was not appli-

cable to tax-free alcohol upon which no bond was maintained. In order to extend the meaning of the term it would be necessary to find that it had been used in a peculiar sense not expressed in the language of the tariff. This cannot be accomplished merely by showing that the commodity involved, although different in character, should have the same rate as that afforded to alcohol in bond.

Appellant alleges in its Seventh Specification of Error that the court erred in rejecting certain exhibits consisting of tariffs of carriers other than appellee not applicable to the shipments here involved. At the time of the offer of these exhibits appellant's witness, Griffin, was on the stand giving expert testimony concerning his interpretation of the applicable tariff (Tr. 43). Counsel for appellant urged that the exhibits should be received "as an explanation" of the meaning to be attached to the words "alcohol in bond" (Tr. 45). It was not explained to the court that any lines interested in the shipments involved in this case were parties to such tariffs. Appellant now urges for the first time, however, that Illinois Central Railway Company was a party to such tariffs and was one of the carriers participating in the shipments involved herein; and that for such

reasons the exhibits were admissible to show the interpretation which the carriers placed on Transcontinental Freight Bureau Westbound Tariff No. 4-T, which applied to the shipments involved herein.

Insofar as concerns appellee, any statements in other tariffs to which it was not a party were clearly inadmissible. The rule of res inter alias acta precludes the introduction of evidence of transactions not affecting a party to an action and to which he was not a party. 20 Am. Jur. 280; *Boord v. Kaylor*, 100 Ore. 366, 197 Pac. 296; *State v. German*, 162 Ore. 166, 184, 90 P. (2d) 185; *Chapman v. Metropolitan Life Insurance Co.* (S. C.) 173 S. E. 801; *Chicago and E. I. R. Co. v. Schultz* (Ill.) 71 N. E. 1050. The fact that Illinois Central Railway Company had participated with carriers other than appellee in tariffs specifying the same rate for alcohol in bond and tax-free alcohol could not possibly bind appellee or indicate a similar intention of the carriers participating in the tariff applicable to the shipments involved herein.

The exhibits were offered for the purported purpose of showing the construction which other carriers had given to the term "alcohol in bond." How-

ever, actually they showed at most a policy of granting the "in bond" rate to tax-free alcohol. If any significance at all can be attached to the rejected exhibits, the fact that the carriers participating therein deemed it necessary to mention specifically tax-free alcohol would seem to indicate that they did not consider it included within the definition of alcohol in bond.

The District Court afforded appellant the opportunity to show that the opinion of its expert was based in part upon the fact that the tariffs of other lines treated tax-free alcohol as alcohol in bond (Tr. 44), but appellant failed to avail itself of this opportunity. The reason for the failure is, perhaps, indicated by the following testimony of appellant's witness Griffin:

> "Traffic men, you know, get around and exchange ideas and talk in meetings and Bureau meetings and discuss things, *but I don't know that there's any fixed opinions of what 'in bond' means.*" (Tr. 54). (Emphasis supplied).

In any event, the evidence rejected, if it had any probative value, related entirely to a dispute as to the meaning of the term "alcohol in bond." As we

have stated, if something other than the ordinary meaning is to be given to the term, only the Interstate Commerce Commission had power to decide this dispute in the first instance and no evidence thereon was admissible.

It is therefore respectfully submitted that the judgment of the District Court should be affirmed.

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